DATO' SERI ANWAR IBRAHIM

v.

PP

FEDERAL COURT, PUTRAJAYA
ABDUL MALEK AHMAD PCA
SITI NORMA YAAKOB FCJ
ALAUDDIN MOHD SHERIFF FCJ
[CRIMINAL APPEAL NO: 05-4-2000 (W)]
15 SEPTEMBER 2004

CRIMINAL PROCEDURE: *Judgment - Grounds of judgment - Grounds of Judgment of Federal Court - Mode of delivery - Written judgments on separate issues by only two members of three-member panel - Whether proper - Direction by Chief Justice as to who should write judgments - Whether impinging on judicial independence of individual judges - Emergency (Essential Powers) Ordinance No. 22 of 1970 s. 2 - Courts of Judicature Act 1964, s. 94(2), proviso thereof - Federal Constitution, art. 124(2)*

CRIMINAL PROCEDURE: *Jurisdiction of court - Federal Court - Inherent powers - Whether can reopen or review its own decision - Rule 137, Rules of Federal Court 1995 - Powers of Federal Court to hear applications - Whether intra vires - Courts of Judicature Act 1964, ss. 16, 17, 94(2) - Federal Constitution, arts. 121(2)(c), 124(2), 128, 130, 160*

CONSTITUTIONAL LAW: *Courts - Jurisdiction of Federal Court - Whether can reopen or review its own decision - Rule 137, Rules of Federal Court 1995 - Whether ultra vires and unconstitutional - Federal Constitution arts. 121(2)(c), 124(2), 128, 130, 160 - Courts of Judicature Act 1964, ss. 16, 17, 94(2)*

STATUTORY INTERPRETATION: *Subordinate legislation - Validity - Rules of Federal Court 1995 - Whether a subsidiary legislation - Whether having legislative effect - Whether constitutional - Federal Constitution art. 121(2)(c) - Courts of Judicature Act 1964, ss. 16, 17 - Rules of Federal Court 1995, r. 137*

The applicant was convicted by the High Court on four counts of corrupt practices under s. 2 of the Emergency (Essential Powers) Ordinance No. 22 of 1970 and was sentenced to six years of (concurrent) imprisonment on each of the charges. The applicant appealed, but the appeal was dismissed by the Court of Appeal, and subsequently by the Federal Court ('the impugned

judgment'). The applicant alleged serious bias on the part of the trial judge (instanced by his lordship's handling of *Zainur Zakaria*'s case, *inter alia*), and flaws and infirmities on the part of the appellate courts in deciding the appeals, and in the upshot, motioned the Federal Court to review the impugned judgment pursuant to r. 137 of the Federal Court Rules 1995 ('the RFC'), and admit new evidence and issues tendered in support thereof. The applicant further took exception to the impugned judgment, embodied as it were in two separate judgments written by two members of the Federal Court's three-member corum ('the first corum'), grieving that the Chief Justice, in directing the judgments to be so written and delivered pursuant to the powers granted him by s. 94(2) of the Courts of Judicature Act 1964 ('the CJA'), had impinged on the judicial independence of the individual judges of the Federal Court.

The respondent raised a preliminary objection that the Federal Court did not have the jurisdiction either in law or under common law to legislate on the appeals, and that r. 137 of the RFC, on which two of the motions were grounded, was *ultra vires* the CJA and the Federal Constitution ('FC'). In the event, the following questions arose before the learned appellate judges, namely: (i) whether r. 137 of the RFC is a subsidiary legislation and must be construed as such; (ii) whether r. 137 RFC gives the Federal Court the inherent power and jurisdiction to reopen or rehear a case or review its own decision; and (iii) the constitutionality of s. 94(2) of the CJA.

Held (dismissing the motions):
Per Abdul Malek Ahmad PCA, overruling the preliminary objection

[1] Article 121(2)(c) of the FC provides "such other jurisdiction as may be conferred by or under Federal law". Consequently para (b) of the definition of "Federal law" at cl. 2 of art. 160 of the FC only applies to any Act of Parliament, which must include the RFC, since the RFC is the subsidiary legislation of the relevant Act of Parliament, namely the CJA. Looking at both ss. 16 and 17 of the CJA, rules can certainly be made for the practice and procedure where the courts have jurisdiction. (p 177 c-d)

[1a] Since r. 137 of the RHC has legislative effect, the Federal Court therefore has jurisdiction to hear an application brought before it under the rule. The long line of cases also support our thinking that we have the jurisdiction and the power to reopen and review any matter already decided by this court if there is any allegation of injustice or abuse of the process of the court. (pp 177 b & d-f)

Per Siti Norma Yaacob FCJ, concurring and ruling that s. 94(2) CJA was constitutional

[1] Rule 137 of the RFC does provide us with the inherent powers to review our earlier decisions provided that such an exercise be undertaken sparingly and only in rare and exceptional circumstances to prevent injustice. Consequently, r. 137 is not *ultra vires* the CJA or the Federal Constitution (p 179 b-d)

[2] From the unambiguous language of s. 94(2) CJA, the usual and accepted practice is that there will be one judgment delivered at the conclusion of the hearing, to be delivered by the Chief Justice if he is presiding, or the most senior member of the corum if he is not. Section 94(2), however, does not prevent or debar separate written judgments being given by the other members of the corum, even though the consensus reached was unanimous. (p 181 e-h)

[2a] Where there is dissent and no unanimous majority reached, reliance could be had on the proviso to s. 94(2), as separate judgments need be prepared and delivered and the Chief Justice needs to determine who should write the separate judgments. The Chief Justice, when deciding to act under the proviso, however, is not dictating how a judge should decide a case. He is not asking the judge to decide favourably for a given person or authority. He is exercising a function which the law allows him to do, namely to direct who should deliver and prepare the separate judgments, no more no less. It is thus more like performing a non judicial duty concerning the administration of justice. (pp 182 b & g-h)

[3] The judgment (on the issue of conviction) by Haidar Mohd Noor FCJ, the most senior member of the first corum, was titled 'judgment of the court', and throughout the judgment there was a strong preference in the use of the subjective plural "we" as opposed to the subjective singular "I". It was therefore a concurrent judgment concluded after all the three members had discussed the issues raised and unanimously concluded that the convictions stand. The fact that the concurrence of the other two members was not expressed in the judgment was of no consequence, as such concurrence had been adequately revealed in the language of the judgment. The same could be said of the judgment of Mohd Dzaiddin Abdullah, the then Chief Justice who presided in the appeals and delivered the other judgment on sentence. His concluding remarks bore all the resemblance of a concurrent judgment notwithstanding that he had headed the judgment in his own name. (p 183 b-f)

[3a] Since both judgments have adequately and unanimously decided on the main issues of conviction and sentence, and read together represent the judgment of the court, the absence of a written judgment from the Chief Judge of Sabah and Sarawak, the third member of the corum, cannot affect the legality of the judgment and neither can it be taken to mean that he has dissented. The fact that he had not produced a written judgment points to the conclusion that he was in complete agreement with the views of the two members, and saw no purpose in repeating them. (pp 183 h & 184 a)

[4] Section 94(2) of the CJA and its proviso do not have the effect of curtailing the judicial independence of any individual judge when the Chief Justice determines who should prepare and deliver separate judgments in a criminal appeal or matter. To that extent, the applicant cannot rely on these provisions to support his claim to have his appeals reviewed before another panel of this court. (p 184 b-c)

Per Alauddin Mohd Sheriff FCJ, concurring and dismissing application to adduce new evidence/additional grounds for motions

[1] The new evidence mentioned in para 17 of the applicant's affidavit is not evidence that was not available at the trial. The charges faced by the applicant was one of abuse of power under s. 2(1) of Ordinance 22 of 1970 and the alleged new evidence was available during the trial itself. More importantly, the learned trial judge had rejected this evidence as being irrelevant and the Court of Appeal and the Federal Court had upheld the finding. As they have no relevance to the charges faced by the applicant, they cannot therefore materially affect the result of the case (*R v. Parks* [1961] 3 All ER 633 and *Mohamad bin Jamal v. PP* [1964] 30 MLJ 254 followed). (p 188 a-b)

[2] The other issues raised by the applicant were also issues that could have been obtained during the trial and will not materially affect the result of the trial had they been brought up for examination. They cannot therefore be viewed as a ground to invoke r. 137. (p 188 f-g)

[3] The allegation of misapprehension of facts against the trial judge is not new evidence but an issue that goes to the merit of the case and should have been canvassed throughout the appeal process. Even if the purported misapprehension was a ground of appeal, it does not lend weight against the charges. (p 189 a)

[4] The first corum had embarked upon a full and proper consideration of the effect of *Zainur Zakaria*'s case in the appeal before it. The court had categorically stated that the facts and circumstances of *Zainur Zakaria* cannot be equated with the facts of the applicant's case, and retorted that the conduct of the learned judge in *Zainur Zakaria* is not really relevant to the amended charges faced by the applicant. Further, the said contempt proceedings is a separate proceedings altogether. It was only against *Zainur Zakaria* and not the whole of the defence team. (p 191 b-c)

[4a] The first corum had also examined the applicant's complaint that his submission on the conduct of the learned judge was brushed aside by the Court of Appeal. Nonetheless, though the Federal Court had agreed that there was omission by the Court of Appeal to consider that issue, the court concluded that it had occasioned no miscarriage of justice. Hence, we cannot see how the judgment of the first corum could have suffered the infirmities alleged. We also fail to see how the decision can be said to have irregularities under the CJA. (pp 191 e-f & 192 h-i)

[5] It cannot be the intention of the legislature in promulgating r. 137 that every decision of this court is subject to review. To do so would be against the fundamental principle that the outcome of litigation should be final. The rule therefore applies in limited circumstances and is on a case to case basis. On the facts and in the circumstances, there are no merits to invoke the exercise of our inherent powers under the rule. (p 193 e-h)

*[**Bahasa Malaysia** Translation Of Headnotes*

Pemohon telah disabit oleh Mahkamah Tinggi atas empat kesalahan rasuah di bawah s. 2 Ordinan Darurat (Kuasa-Kuasa Khas) No. 22 Tahun 1970 dan telah dihukum 6 tahun penjara (serentak) bagi setiap kesalahan. Pemohon merayu, tetapi rayuannya telah ditolak oleh Mahkamah Rayuan, dan kemudian oleh Mahkamah Persekutuan ('penghakiman yang dicabar'). Pemohon mendakwa wujud sikap berat sebelah yang serius di pihak hakim bicara (dilihat pada cara yang arif menangani kes *Zainur Zakaria*, umpamanya) dan beberapa kecacatan dan kelemahan di pihak mahkamah-mahkamah rayuan ketika memutuskan rayuan, dan dengan itu telah mengusul kepada Mahkamah Persekutuan supaya mengkaji semula penghakiman yang dicabar di bawah k. 137 Kaedah-Kaedah Mahkamah Persekutuan 1995 ('KMP'), serta menerima keterangan-keterangan dan isu-isu baru yang kemukakan bagi menyokong usul-usul tersebut. Pemohon juga membantah penghakiman yang dicabar, yang terdiri dari dua penghakiman berasingan yang ditulis oleh dua dari tiga ahli panel Mahkamah Persekutuan ('korum pertama'), dengan menyatakan ketidakpuasan hati bahawa Ketua Hakim

Negara, dalam mengarahkan penghakiman-penghakiman tersebut ditulis dan disampaikan secara yang berlaku di sini di bawah kuasa-kuasa yang diberikan kepadanya oleh s. 94(2) Akta Mahkamah Kehakiman 1964 ('AMK'), telah mencabul kebebasan kehakiman hakim-hakim Mahkamah Persekutuan.

Responden membuat bantahan awal bahawa Mahkamah Persekutuan tidak mempunyai bidang kuasa sama ada di sisi undang-undang mahupun pada common law untuk membicarakan rayuan-rayuan di sini, dan bahawa k. 137 KMP adalah ultra vires AMK dan Perlembagaan Persekutuan ('PP'). Persoalan-persoalan berikut, dengan itu, telah berbangkit untuk keputusan yang arif hakim-hakim rayuan, iaitu: (i) sama ada k. 137 KMP suatu undang-undang subsidiari dan harus ditafsir berdasarkan kedudukan itu; (ii) sama ada k. 137 memberikan Mahkamah Persekutuan kuasa semulajadi dan bidang kuasa untuk membuka atau mendengar semula sesuatu kes atau mengkaji semula keputusannya sendiri; dan (iii) keperlembagaan s. 94(2) AMK.

Diputuskan (menolak usul-usul):
Oleh Abdul Malek Ahmad PMR, menolak bantahan awal

[1] Fasal 121(2)(c) PP memperuntukkan "apa-apa bidang kuasa lain yang diberikan oleh atau di bawah undang-undang persekutuan". Oleh yang demikian, perenggan (b) dalam definasi "undang-undang persekutuan" di perenggan (2) Fasal 160 PP hanya terlaksana kepada mana-mana Akta Parlimen, yang semestinya termasuk KMP, disebabkan KMP adalah satu undang-undang subsidiari kepada Akta Parlimen yang relevan, iaitu AMK. Melihat kepada ss. 16 dan 17 AMK, kaedah-kaedah tentunya boleh dibuat bagi tujuan amalan dan prosedur di mana mahkamah mempunyai bidang kuasa.

[1a] Oleh kerana k. 137 mempunyai kesan undang-undang, maka Mahkamah Persekutuan mempunyai bidang kuasa untuk mendengar sesuatu permohonan yang dibawa ke hadapannya di bawah kaedah tersebut. Terdapat banyak kes-kes autoriti yang menyokong pendapat kami bahawa kami mempunyai bidang kuasa dan kuasa untuk membuka semula dan mengkaji semula apa jua halperkara jika terdapat dakwaan ketidakadilan atau salah guna proses mahkamah.

Oleh Siti Norma Yaacob HMP, menyetujui dan memutuskan s. 94(2) AMK berperlembagaan

[1] Kaedah 137 KMP memberikan kami kuasa-kuasa semulajadi untuk mengkaji semula keputusan-keputusan terdahulu kami dengan syarat pelaksanaannya dibuat secara berhati-hati dan hanya dalam keadaan-keadaan luar biasa sahaja. Oleh yang demikian, k. 137 tidaklah *ultra vires* AMK ataupun PP.

[2] Dari bahasa jelas s. 94(2) AMK, amalan biasa dan yang diterima adalah bahawa terdapat hanya satu penghakiman yang diberikan di akhir pendengaran, yang diberikan oleh Ketua Hakim Negara jika beliau bersidang, atau jika tidak oleh ahli sidang yang paling senior. Seksyen 94(2) bagaimanapun tidak menghalang penghakiman-penghakiman bertulis berasingan diberi oleh mana-mana ahli, walaupun konsensus yang dicapai adalah sebulat suara.

[2a] Jika terdapat penghakiman menentang dan majoriti sebulat suara tidak dicapai, pergantungan boleh dibuat kepada proviso kepada s. 94(2), kerana penghakiman berasingan perlu disediakan dan Ketua Hakim Negara pula perlu menentukan siapa yang akan menulis penghakiman-penghakiman yang berasingan itu. Ketua Hakim Negara, apabila bertindak di bawah proviso ini, bagaimanapun, tidaklah membuat arahan bagaimana seseorang hakim itu perlu mencapai keputusannya. Beliau tidak meminta supaya seseorang hakim itu membuat keputusan yang berpihak kepada mana-mana orang atau pihak berkuasa. Beliau hanya melaksanakan fungsi yang beliau dibenar oleh undang-undang untuk melakukannya, tidak lebih dan tidak kurang dari itu. Ianya dengan itu tidak lebih dari melaksanakan tanggungjawab bersifat bukan kehakiman untuk pentadbiran undang-undang.

[3] Penghakiman (atas isu sabitan) oleh Haidar Mohd Noor HMP, ahli paling senior korum pertama, adalah bertajuk "penghakiman Mahkamah", dan disepanjang penghakimannya terdapat kecenderungan yang ketara untuk menggunakan subjektif plural "Kami" berbanding dengan subjektif singular "Saya". Dengan itu ia adalah satu penghakiman bersama yang diputuskan selepas ketiga-tiga ahli korum berbincang tentang isu-isu yang berbangkit dan sebulat suara bersetuju dengan pensabitan-pensabitan. Fakta bahawa persetujuan dua ahli lain tidak dinyatakan di situ tidak memberi apa-apa kesan, kerana persetujuan sedemikian tercermin dengan secukupnya dalam penghakiman. Samalah juga dengan penghakiman Mohd Dzaiddin Abdullah, Ketua Hakim Negara ketika itu yang mengetuai sidang-sidang rayuan dan memberi keputusan berhubung hukuman. Ulasan-ulasan penutupnya jelas menggambarkan satu penghakiman bersama walaupun tajuk penghakiman ditulis dengan nama beliau sendiri.

[3a] Oleh kerana kedua-dua penghakiman telah dengan sebulat suara dan dengan secukupnya membuat keputusan atas isu-isu penting sabitan dan hukuman, dan mencerminkan penghakiman oleh mahkamah jika dibaca secara bersesama, maka ketiadaan penghakiman bertulis Ketua Hakim Sabah dan Sarawak, ahli ketiga korum tersebut, tidak menjejaskan kesahan penghakiman dan tidak juga bermakna bahawa beliau telah

menentang. Fakta bahawa beliau tidak mengemukakan penghakiman bertulis menunjukkan bahawa beliau bersetuju sepenuhnya dengan pendapat kedua-dua ahli berkenaan dan merasakan tidak perlu untuk mengulanginya lagi.

[4] Seksyen 94(2) AMK dan provisonya tidak mempunyai kesan membatasi kebebasan kehakiman mana-mana hakim apabila Ketua Hakim Negara memutuskan siapa yang harus menyediakan dan menyampaikan penghakiman-penghakiman yang berasingan dalam sesuatu rayuan atau hal jenayah. Setakat itu, pemohon tidak boleh bergantung kepada peruntukan-peruntukan tersebut bagi menyokong tuntutannya supaya rayuan-rayuan dikaji semula oleh sebuah panel lain mahkamah ini.

Oleh Alauddin Mohd Sheriff HMP, menyetujui dan menolak permohonan untuk mengemukakan keterangan baru/alasan tambahan

[1] Keterangan baru yang disebut dalam perenggan 17 afidavit pemohon bukanlah keterangan yang tidak boleh didapati semasa perbicaraan. Pertuduhan yang dihadapi oleh pemohon adalah kerana salah guna kuasa di bawah s. 2(1) Ordinan 22 Tahun 1970 dan keterangan baru yang didakwa tersebut jelas boleh diperolehi semasa perbicaraan itu. Lebih penting, yang arif hakim telah menolak keterangan itu sebagai tidak relevan dan keputusannya telah disahkan oleh Mahkamah Rayuan dan Mahkamah Persekutuan. Oleh kerana ianya tidak relevan kepada pertuduhan-pertuduhan yang dihadapi pemohon, maka ia tidak boleh memberi kesan secara yang material kepada keputusan kes (*R v. Parks* [1961] 3 All ER 633 dan *Mohamad bin Jamal v. PP* [1964] 30 MLJ 254 diikuti)

[2] Isu-isu lain yang dibangkitkan pemohon juga boleh diperolehi semasa perbicaraan dan tidak memberi kesan ketara kepada keputusan perbicaraan jika dikemukakan untuk pertimbangan. Isu-isu tersebut dengan itu tidak boleh dilihat sebagai satu alasan untuk membangkitkan k. 137.

[3] Dakwaan salah tanggap fakta oleh hakim bicara bukanlah suatu keterangan baru tetapi adalah suatu isu yang relevan kepada merit kes dan seharusnya dihujah disepanjang proses rayuan. Jikapun salah tanggap yang didakwa itu boleh menjadi alasan rayuan, ia tidak memberi kesan kepada pertuduhan-pertuduhan.

[4] Korum pertama, dalam rayuan di hadapannya, telah membuat pertimbangan-pertimbangan wajar dan menyeluruh terhadap kesan-kesan kes *Zainur Zakaria*. Mahkamah telah menyatakan secara khusus bahawa fakta-fakta dan suasana kes *Zainur Zakaria* tidak boleh disamakan dengan

fakta-fakta dan keadaan kes pemohon, dan telah membalas bahawa perilaku yang arif hakim dalam *Zainur Zakaria* adalah tidak berapa relevan kepada pertuduhan-pertuduhan terpinda yang dihadapi oleh pemohon. Lagipun, prosiding penghinaan tersebut adalah prosiding yang berasingan sama sekali. Ia hanya terhadap *Zainur Zakaria* dan tidak keseluruhan pasukan pembelaan.

[4a] Korum pertama juga telah meneliti bantahan pemohon bahawa hujahnya mengenai perilaku yang arif hakim telah tidak dilayan oleh Mahkamah Rayuan. Namun begitu, walaupun Mahkamah Persekutuan bersetuju bahawa Mahkamah Rayuan telah gagal menangani isu itu, ia berpendapat bahawa kegagalan tersebut tidak membawa kepada salah laksana keadilan. Yang demikian, kami tidak dapat melihat bagaimana terdapat kelemahan pada penghakiman korum pertama itu seperti yang didakwa. Juga, kami tidak dapat melihat bagaimana keputusan tersebut boleh menjadi tidak teratur di bawah AMK.

[5] Bukanlah tujuan badan perundangan apabila menggubal k. 137 bahawa setiap keputusan mahkamah ini boleh tertakluk kepada kajian semula. Berbuat demikian adalah bertentangan dengan prinsip penting bahawa harus ada kemuktamadan dalam sesuatu guaman. Pelaksanaan kaedah ini dengan itu adalah terhad untuk keadaan-keadaan tertentu sahaja dan dibuat berasaskan merit setiap satu kes. Berdasarkan fakta dan keadaan, tiada merit untuk melaksanakan kuasa-kuasa semulajadi kami di bawah kaedah ini.

Case(s) referred to:

Adorna Properties Sdn Bhd v. Boonsom Boonyanit [2001] 2 CLJ 133 FC ***(refd)***

Allied Capital Sdn Bhd v. Mohd Latiff Shah Mohd [2001] 2 CLJ 253 FC ***(refd)***

Attorney-General v. Sillem [1864] 11 ER 1200

Auto Dunia Sdn Bhd v. Wong Sai Fatt & Ors [1995] 3 CLJ 485 FC ***(dist)***

British South Africa Co v. Companhia de Mocambique [1893] AC 602

Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [2001] 4 CLJ 61 FC ***(refd)***

Dato' Mohamed Hashim Shamsuddin v. Attorney-General, Hongkong [1986] 2 MLJ 112 ***(refd)***

Dato' Mokhtar Hashim & Anor v. PP [1983] 2 MLJ 232 ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2002] 3 CLJ 457 FC ***(refd)***

Asiatic Development Bhd & Anor v. Balachandran Palanysamy [1996] 1 CLJ 725 CA ***(foll)***

Keshodass Wadhumal Advani v. Syed Murtaza Ali Khan AIR [1952] All 318 ***(refd)***

Lau Foo Sun v. Government of Malaysia [1970] 2 MLJ 70 ***(foll)***

Lo Fat Thjan & Ors v. PP [1968] 1 MLJ 274 ***(refd)***
Megat Najmuddin Dato' Seri Dr Megat Khas v. Bank Bumiputra (M) Sdn Bhd [2002] 1 CLJ 645 ***(foll)***
MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC ***(foll)***
Mohamad Jamal v. PP [1964] 30 MLJ 254 ***(refd)***
R v. Bow Street Metropolitan Stipendiary Magistrate & Ors, ex p Pinochet Ugarte (No 2) [1999] 1 All ER 577 ***(refd)***
R v. Parks [1961] 3 All ER 633 ***(foll)***
Seray-Wurie v. Hackney London Borough Council [2002] 3 All ER 448 ***(foll)***
Tai Chai Yu v. The Chief Registrar of the Federal Court [1998] 2 CLJ 358 CA ***(refd)***
Taylor & Anor v. Lawrence & Anor [2002] 1 All ER 353 ***(foll)***
Tunde Apatira & Ors v. PP [2001] 1 CLJ 381 FC ***(refd)***

Legislation referred to:
Courts Ordinance 1948, s. 31(2)
Courts of Judicature Act 1964, ss. 16(1), 17, 62(2), 68(1)(a), 69, 78(1), 92(1), 94(2)
Emergency (Essential Powers) Ordinance No 22 of 1970, s. 2(1)
Federal Constitution, arts. 121(2)(c), 124(2), 128, 130, 160
Rules of the Federal Court 1995, r. 137
Rules of the High Court 1980, O. 66
Supreme Court Rules 1966, O. 40

Other source(s) referred to:
Judges' Code of Conduct 1994, r. 3(1)(d)

For the appellant - Karpal Singh (SN Nair, Gobind Singh Deo, Kamar Ainiah Kamaruzzaman, Pawanchek Marican, Zulkifli Noordin, Saiful Izham Ramli, Christopher Fernando & Marisa Regina); M/s Karpal Singh & Co
For the respondent - Abdul Gani Patail A-G (Mohd Yusoff Zainal Abiden, Tun Abdul Majid Tun Hamzah & Ahmad Fairuz Zainol Abidin SFCC)
Vernon Ong holding watching brief for Bar Council

[Appeal from Court of Appeal; Criminal Appeal Nos: W05-25-99 & W05-27-99]

Reported by AC Simon

JUDGMENT

Abdul Malek Ahmad PCA:

Heightened by the release of the applicant by this court on sodomy charges some four days before we heard these applications, the intense speculation pertaining to the outcome of the four motions before us had certainly generated a certain amount of undue interest and unwanted publicity. This bad timing certainly would not have occurred if the first of the four motions filed on

9 August 2002, applying to set aside the convictions and sentences of the applicant on corruption charges, had been disposed of much earlier considering the lapse of twenty five months.

The first motion at encl. 80(a) filed on 9 August 2002 was for an order that the court invokes its inherent powers under r. 137 of the Rules of the Federal Court 1995 (hereinafter "the RFC") to set aside the convictions and sentences of the applicant that were confirmed and upheld by this court on 10 July 2002 or make such further or other orders it deemed fit and proper in the interests of justice.

The second motion at encl. 89(a) filed on 10 March 2003 was for an order that this court again invoke its inherent powers under r. 137 of the RFC to allow fresh/additional evidence affecting the trial to be adduced as such evidence was not available during the trial or make such further or other orders it deemed fit and proper in the interests of justice.

The third motion at encl. 97(a) filed on 14 March 2003 was for an order that the applicant be allowed leave to rely on five additional grounds stated therein.

The fourth motion at encl. 124(a), filed four days before the hearing, was also for an order that the applicant be allowed leave to rely on another additional ground which was that s. 94(2), including the proviso thereto, of the Courts of Judicature Act 1964 (hereinafter "the CJA") is unconstitutional and void and of no effect as it impinges on the judicial independence of the individual judges of the Federal Court.

I shall only deal with the jurisdiction point while the four motions will be dealt with in detail by my learned sister Siti Norma Yaakob FCJ and my learned brother Alauddin Mohd Sheriff FCJ in their separate judgments.

It is pertinent at this point to reproduce r. 137 of the RFC which reads:

> 137. For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

At the commencement of the proceedings, the learned Attorney General for the respondent and Karpal Singh for the applicant told the Court that both parties had agreed that arguments would begin with the preliminary objection by the respondent on the first motion. On hindsight and having heard their submissions, it was our finding that the preliminary objection was quite unnecessary as it could have easily been argued as part of the submissions on the motions themselves.

The learned Attorney General started off by stating that r. 137 of the RFC is *ultra vires* the CJA and the Federal Constitution (hereinafter "the FC"). He added that this is not the first criminal review as on 10 June 2003 this court (Haidar Mohd Noor CJM, Steve Shim CJSS and Siti Norma Yaakob FCJ) had in *Tunde Apatira & 2 Ors. v. Public Prosecutor* in Federal Court [2001] 1 CLJ 381, dismissed a similar application.

Karpal Singh for the applicant had immediately interjected to say that there was no written judgment in that application and that this court did not in any way state that r. 137 of the RFC did not apply. The relevant order, he said, only stated that the application was dismissed. Further, the relevant newspaper report only mentioned that the court had to dismiss the application based on the fact that there has been a final decision relating to the conviction and sentence.

The learned Attorney General continued by saying that r. 137 of the RFC was created pursuant to s. 17 of the CJA which must be read together with s. 16 thereof. Section 16 of the CJA, he said, provided for the making of rules of court only for the purpose of prescribing the practice and procedure where the court has jurisdiction.

He added that there is a distinction between "jurisdiction" and "power". The former, he continued, denotes the types of subject matter which the court may deal with and in relation to which it may exercise its powers. He said that the court cannot exercise powers in matters over which it has no jurisdiction. He stressed that the court must have jurisdiction before it can exercise its powers.

He then referred to cl. (2) of art. 121 of the FC which reads:

> (2) There shall be a court which shall be known as the Mahkamah Persekutuan (Federal Court) and shall have its principal registry in Kuala Lumpur, and the Federal Court shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from decisions of the Court of Appeal, of the High Court or a judge thereof;
>
> (b) such original or consultative jurisdiction as is specified in Articles 128 and 130; and
>
> (c) such other jurisdiction as may be conferred by or under federal law.".

Article 121 of the FC, he argued, relates to the judicial power of the Federation. The learned Attorney General also cited two articles in the FC which deal with the jurisdiction of this court and they are art. 128 and art. 130 of the FC.

Reference was made to *Auto Dunia Sdn Bhd v. Wong Sai Fatt & 3 Ors* [1995] 3 CLJ 485 where this court (Lamin Mohd. Yunus PCA, Edgar Joseph Jr. and Wan Adnan Ismail FCJJ), at the conclusion of arguments on the preliminary objection taken by learned counsel for the respondents, held that this court had no jurisdiction to entertain the appellant's application for leave to appeal.

Unfortunately, we felt that this authority was off its mark as there the High Court gave judgment for less than RM250,000 and consequently the Court of Appeal refused to grant leave to appeal under s. 68(1)(a) of the CJA. The finding of this court was more in the context of whether an appeal lies to this court from such a refusal of the Court of Appeal.

The learned Attorney General pointed out that in India, the powers to review a judgment is enacted in the Indian Constitution itself at art. 137 which states:

> 137. Subject to the provisions of any law made by Parliament or any rules made under article 145, the Supreme Court shall have power to review any judgment pronounced or order made by it.

In consequence, he argued that there is a finality to appeals as there is a Pardons Board and we cannot allow matters to be reopened. He emphasised that r. 137 of the RFC is not a jurisdiction provision as it is made pursuant to s. 17 of the CJA.

The Rules Committee, he added, cannot draft rules on this matter. The argument that ss. 16 and 17 of the CJA make provision for the Rules Committee to make rules to confer jurisdiction to this court is contrary to the enshrined doctrine of separation of powers which expressly provide that legislative powers conferring jurisdiction to the courts are to be exercised by its elected legislature.

Karpal Singh submitted that r. 137 of the RFC is subsidiary legislation and must be construed as such in essence and in substance. He said that the learned Attorney General may have a point in saying that being subsidiary legislation, it cannot confer jurisdiction and power but it was his contention that inherent powers are at all levels and it was unfortunate that in the *Tunde Apatira* application, the opportunity did not arise to address the matter at length.

He argued that it is inherent jurisdiction which confers the power and not r. 137 of the RFC which is superfluous. In criminal matters, he added, the courts should be more inclined to use its inherent jurisdiction.

Learned counsel referred to *Chia Yan Teck & Anor v. Ng Swee Kiat* [2001] 4 CLJ 61 where this court (Mohd Dzaiddin CJ, Steve Shim CJSS and Haidar Mohd Noor FCJ) held that r. 137 of the RFC clearly gives the Federal Court the inherent power to hear any application or to make any order as may be necessary to prevent injustice although the issue of reopening or reviewing the court's decision in that case did not arise.

The finding in that case as regards the issue of reopening or reviewing the court's decision not arising has to be viewed in the context of the circumstances of that application. The appeal in the Federal Court there was heard on 3rd August 2000 before Eusoff Chin CJ, Wan Adnan Ismail CJM and Zakaria Yatim FCJ but judgment was reserved. On 19 December 2000, the parties' solicitors were informed that judgment would be pronounced on 22 December 2000. This, the deputy registrar did, allowing the appeal with costs.

The contention of the respondents there was that the judgment pronounced on 22 December 2000 was a nullity as two of the three judges on the panel had retired as judges before that date and relied on r. 63 of the RFC dealing with pronouncement of judgment. Learned counsel for the appellants, on the other hand, relied on s. 78(1) of the CJA pertaining to, as the marginal note states, "continuation of proceedings notwithstanding absence of judge".

The relevant excerpt of the judgment states:

> In my opinion, there is a clear distinction between the giving of judgment under s. 78 of the Act and the pronouncement of the said judgment in r. 63 of the Rules. Section 78 of the Act provides that the judgment or reserved judgment shall be given by the remaining judges of the court, not being less than two, and in which case, the court shall be deemed to be duly constituted. This begs the question: when is the judgment of the remaining judges given? The section does not provide the manner in which the time from when the judgment is to take effect. Rule 63 of the Rules seems to provide the answer. Clearly, r. 63 of the Rules provides the mode how a judgment is to be delivered, which is, by pronouncement in open court, and under para (2) of r. 63 of the Rules, it may be read by a judge of the court or by the registrar. It seems that this was also the practice of the House of Lords where the pronouncement is made in open court in a formal way (*W'Field Fr Co v. Steel Construction Co* at p. 686). It must not be forgotten that the Rules have statutory force and are not mere rules of practice. See *Pacific Centre Sdn Bhd v. United Engineers (M) Sdn Bhd* [1984] 2 MLJ 143.

On the question of jurisdiction, which interestingly enough the submissions of learned counsel for the appellants there are similar to that of the learned Attorney General here, this court said:

> Dato' Dr Das also submitted that the Federal Court has no jurisdiction to reopen or rehear a case or review its own decision. Counsel relied on art. 128(3) of the Federal Constitution, which states 'the jurisdiction of the Federal Court to determine appeals from the Court of Appeal, a High Court or a judge thereof shall be such as may be provided by federal law.' The Court of Judicature Act 1964 is such a law. He also referred to *Lye Thai Sang & Anor v. Faber Merlin (M) Sdn Bhd & Ors* [1986] 1 MLJ 166, where Abdul Hamid CJ (Malaya), (as he then was) held as follows (at p. 168):

> Where, therefore, a final decision has been delivered, an appeal is in effect heard and disposed of. In other words, it is brought to a final conclusion. And that being the case, the Supreme Court has no power to re-open, rehear and re-examine its decision for whatever purpose. The only exception where there can be a re-hearing is only to the extent provided by s. 42, in particular sub-s. (3) of s. 42. The other exception is as provided under s. 44 sub-s (3) to the effect that every order such as that envisaged in sub-s. (1) of s. 44 may be discharged or varied by the full court.

Counsel further submitted that r. 137 of the Rules does not confer jurisdiction or power on the Federal Court.

In reply, Mr Cecil Abraham submitted that in the instant case, the judgment was not given in accordance with the law, ie under s. 78 of the Act and r. 63 of the Rules. This court has the inherent power to determine the issue in order to prevent injustice to the respondents.

With respect, I disagree with Dato' Dr Das that this court has no jurisdiction to hear this application. Rule 137 of the Rules clearly gives us the inherent powers to hear any application or to make any order as may be necessary to prevent injustice. The issue of reopening or reviewing our own decision in the instant case therefore does not arise.

Conclusion

For the above reasons, the application of the respondents for an order that the judgment dated 22 December 2000 be set aside, is allowed with costs, because on that date, the court was not duly constituted as there was only one remaining judge of the court. I also order that the application of the appellant (to) set aside the *ex parte* order dated 4 January 2001, allowing the stay of execution be dismissed with costs. In the result, the appeal shall be reheard by a newly constituted panel of the Federal Court.

Despite concluding that the issue of reopening or reviewing its own decision did not arise, it ordered that the appeal be reheard by a newly constituted panel of the Federal Court. It has, therefore, to be read with the fact that nothing was being reopened or reviewed as the first panel was not duly constituted but all the same, r. 137 of the RFC had been applied to overcome the problem.

Learned counsel next cited *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577 (Steve Shim CJSS, Siti Norma Yaakob and Haidar Mohd Noor FCJJ) where Steve Shim CJSS dissented only on the point of consent under s. 78 of the CJA. The original appeal in that case was heard by Eusoff Chin CJ, Wan Adnan Ismail CJM and Chong Siew Fai CJSS on 12 and 13 January 1998. The senior assistant registrar read out the reserved

judgment on 12 July 2002 ten days after Chong Siew Fai CJSS had retired. Following *Chia Yan Teck*'s case, and because no consent had been obtained by the parties under s. 78 of the CJA, the appeal was ordered to be reheard before another panel of this court.

In that application, Steve Shim CJSS said at pp. 589 and 590 of the report as follows:

> Inherent jurisdiction
>
> Let me say without more that whilst I agree with the applicant's counsel's contention that the Federal Court has inherent jurisdiction under the common law to review its previous decision, I am however unable to accept his stand that Lye Thai Sang was decided per incuriam. I agree entirely with the view expressed by the Supreme Court in Lye Thai Sang that s. 69(4) of the CJA could not be construed to confer an unlimited power on the Supreme Court to review an earlier decision in an appeal which had already been heard and disposed of and therefore, in that context, the Supreme Court had no power to reopen, rehear and reexamine its previous decision for whatever purpose. Quite clearly, that observation was made in the context of the proper construction to be placed on s. 69(4) of the CJA. But that cannot be read to mean that the Supreme Court had been deprived of its inherent jurisdiction derived under the common law by virtue of s. 3(1)(a) of the Civil Law Act 1956, read with art. 121(2) of the Constitution. This is the common law exception quite apart from the statutory exceptions referred to in *Lye Thai Sang*. In any event, the Federal Court has now been conferred with inherent power under r. 137 of the Rules of the Federal Court 1995. This had also been reiterated very recently by the Federal Court in the case of *Chia Yan Teck & Anor v. Ng Swee Kiat & Anor* [2001] 4 MLJ 1 wherein Mohamed Dzaiddin Chief Justice said at p. 10:
>
> > Rule 137 of the Rules clearly gives us the inherent powers to hear any application or to make any order as may be necessary to prevent injustice.
> >
> > For the reasons stated, I hold the view that the Federal Court does have the inherent jurisdiction and power which can be invoked in limited circumstances to reopen, rehear and reexamine its previous judgment, decision or order which has been obtained by fraud or suppression of material evidence so as to prevent injustice or an abuse of the process of the court. In the circumstances, the preliminary objection raised by counsel for the respondent fails.

Just for the record, the learned judge had in fact expressed the same view three months earlier in *Megat Najmuddin bin Dato' Seri Dr Megat Khas v. Bank Bumiputra (M) Sdn Bhd* [2002] 1 CLJ 645 sitting with Wan Adnan Ismail CJM, Abdul Malek Ahmad, Ahmad Fairuz and Mohtar Abdullah FCJJ.

Learned counsel also referred to the case of *Taylor and Another v. Lawrence and Another* [2002] 1 All ER 353 where it was held by a five member panel of the Court of Appeal in England that it had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. The court had implicit powers to do that which was necessary to achieve the dual objectives of an appellate court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. A court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes. The residual jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised. There was a tension between a court having such a residual jurisdiction and the need to have finality in litigation, so that it was necessary to have a procedure which would ensure that proceedings would only be reopened when there was a real requirement for that to happen. The need to maintain confidence in the administration of justice made it imperative that there should be a remedy in a case where bias had been established, and that might justify the Court of Appeal in taking the exceptional course of reopening proceedings which it had already heard and determined. It should, however, be clearly established that a significant injustice had probably occurred and that there was no alternative effective remedy. The effect of reopening the appeal on others and the extent to which the complaining party was the author of his own misfortune would also be relevant considerations. Where the alternative remedy would be an appeal to the House of Lords, the Court of Appeal would only give permission to reopen an appeal which it had already determined if it were satisfied that the House of Lords would not give permission to appeal.

Some four months later, in *Seray-Wurie v. Hackney London Borough Council* [2002] 3 All ER 448, a three member panel of the Court of Appeal in England held the same view adding that the court should exercise strong control over any such application, so as to protect those who were entitled reasonably to believe that the litigation was already at an end.

R v. Bow Street Metropolitan Stipendiary Magistrate and others, ex parte Pinochet Ugarte (No. 2) [1999] 1 All ER 577 involved the extradition sought by the government of Spain of the former head of state of Chile. Two provisional warrants for his arrest were issued by a metropolitan stipendiary magistrate. The applicant successfully applied to the Divisional Court to quash those warrants, but the quashing of the second warrant was stayed to enable an appeal to the House of Lords on the question of the proper interpretation

and scope of the immunity of a former head of state from arrest and extradition proceedings in the United Kingdom in respect of acts committed whilst he was head of state. Amnesty International was granted leave to intervene in the proceedings. On 25 November 1998, the appeal was allowed by a majority of three to two and the second warrant was restored. Subsequently, the applicant discovered that one of the Law Lords in the majority was a director and chairperson of Amnesty International Charity Ltd, which had been incorporated to carry out Amnesty International's charitable purposes and petitioned the House to set aside the order of 25 November 1998.

It was held by the House of Lords that the principle that a judge was automatically disqualified from hearing a matter in his own cause was not restricted to cases in which he had a pecuniary interest in the outcome, but also applied to cases where the judge's decision would lead to the promotion of a cause in which the judge was involved together with one of the parties. That did not mean that judges could not sit on cases concerning charities in whose work they were involved, and judges would normally be concerned to recuse themselves or disclose the position to the parties only where they had an active role as trustee or director of a charity which was closely allied to and acting with a party to the litigation. In the instant case, the facts were exceptional in that Amnesty International was a party to the appeal, it had been joined in order to argue for a particular result and the Law Lord was a director of a charity closely allied to Amnesty International and sharing its objects. Accordingly, he was automatically disqualified from hearing the appeal. On that score, the petition was granted and the matter was referred to another committee of the House for rehearing.

We also need to mention the Court of Appeal case of *Tai Chai Yu v. The Chief Registrar of the Federal Court* [1998] 2 CLJ 358 (Gopal Sri Ram, Siti Norma Yaakob and Ahmad Fairuz JJCA) where the respondent, the registrar, rejected the petition filed by the appellant, a solicitor, purportedly invoking the original or consultative or inherent jurisdiction of the Federal Court for the purpose of reviewing a decision of that court given earlier against the appellant's client. The appellant's application for leave to apply for an order of certiorari against the registrar was refused by the judge on the ground that the application was frivolous. The appellant appealed. It was held, in dismissing the appeal, that it is trite law that the Federal Court has no jurisdiction of any sort to reopen and review its decision in a case, neither the FC nor the CJA confer any such jurisdiction upon the Federal Court and that a final decision of the Federal Court, once pronounced, is binding upon the parties thereto and its correctness may only be questioned in a subsequent case where the identical point of law arises for decision. Furthermore, the court took into consideration

that the appellant was not the person aggrieved by the decision of the registrar. It was his client's petition that the registrar rejected. The appellant was a stranger to the complaint and, therefore, lacked standing to challenge the decision in question. This is the only case which we have found to follow *Lye Thai Sang*'s case but apart from it being only at the Court of Appeal level, by which we are not bound, we should add that the court had taken note that the appellant there was not the person aggrieved by the decision of the respondent. As for *Lye Thai Sang (supra)*, it must be emphasised here that the only provision considered there was s. 69 of the CJA while r. 137 of the RFC was never considered.

Since then, there has been a number of other applications dealt with by this court under r. 137 of the RFC including *Allied Capital Sdn Bhd v. Mohd Latiff bin Shah Mohd* [2001] 2 CLJ 253, *Adorna Properties Sdn Bhd v. Boonsom Boonyanit* [2001] 2 CLJ 133 and *Wong Siew Choong Sdn Bhd v. Anvest Corporation Sdn Bhd* (Federal Court Civil Appeal No: 02-5-2003 (W).

We now revert to r. 137 of the RFC. Since it is made under s. 17 of the CJA, it is certainly subsidiary legislation. We have cited the passage in *Chia Yan Teck (supra)* where this court, in relying on r. 63 of the RFC, had said that the RFC have statutory force and are not mere rules of practice relying on *Pacific Centre Sdn Bhd v. United Engineers (Malaysia) Bhd (supra).*

Similarly, in *Dato' Mohamed Hashim Shamsuddin v. Attorney-General, Hongkong* [1986] 2 MLJ 112 (Salleh Abas LP, Seah and Abdoolcader SCJJ), the majority view was that the statutory source and enabling provision for O. 66 of the Rules of the High Court 1980 is s. 16(1) of the CJA. The Supreme Court also held that O. 66 of the said Rules is valid and properly enacted in relation to both civil and criminal proceedings and therefore the order made in that case is *intra vires*. Reading the written submissions of the learned Attorney General on the preliminary objection, we note that a substantive portion therein is based on the dissenting judgment of Seah SCJ in that case with which we are not inclined to agree.

It is of no consequence to us that in India, the relevant power to review is a constitutional provision read with O. 40 of the Supreme Court Rules 1966. The principle remains the same. As stated in the AIR *Commentaries to the Constitution of India* Volume III 2nd (1971) Edition at p. 226:

> The Federal Court would exercise its power of review for the purpose of rectifying a mistake which had crept in by misprision in embodying the judgments, or had been introduced through inadvertence in the details of judgments. It could also supply manifest defects in order to enable the decrees to be enforced or add explanatory matter or reconcile inconsistencies. The

> indulgence by way of review was granted mainly owing to the natural desire to prevent irremediable injustice being done by a Court of last resort as where, by some accident, without any blame, a party had not been heard and an order had been inadvertently made as if the party had been heard. But in no case could a rehearing be allowed upon the merits or even on the ground that new matter had been discovered which if it had been produced at the hearing of the appeal might materially have affected the judgment of the Court.

The learned Attorney General agrees that r. 137 is subsidiary legislation which has been defined in the Interpretation and General Clauses Ordinance 1948, which is the law to be applied for the interpretation of the FC, as any Order in Council, proclamation, rule, regulation, order, notification, by-law or other instrument made under any Ordinance, Enactment or other lawful authority and having legislative effect.

He submitted that subsidiary legislation must not be inconsistent with, or contrary to, the provisions of the parent Act. Nowhere does the CJA make provision for conferring jurisdiction or power to review, rehear or reopen an appeal which has been disposed of. And this follows that the rules made under the parent Act cannot confer such jurisdiction or power. Section 16 of the CJA provides that the rules made would be confined only to matters of procedure and practice. Therefore, r. 137 of the RFC which was made pursuant to s. 17 read together with s. 16 of the CJA must be read with the other provisions of the RFC and should be construed within the parameters set out under s. 16 of the CJA. To construe it as conferring or creating additional jurisdiction would be ultra vires the CJA itself and also the FC. The RFC, he added, must also not be in conflict with the intention of the legislature in enacting the substantive legislation namely ss. 16 and 17 of the CJA.

He went on to say that the RFC, made pursuant to s. 17 of the CJA, only prescribes the practice and procedure to be followed but not granting jurisdiction to the Federal Court citing *Attorney-General v. Sillem* [1864] 11 ER 1200, *British South Africa Co. v. Companhia de Mocambique* [1893] AC 602 and *Keshodass Wadhumal Advani v. Syed Murtaza Ali Khan* AIR [1952] All 318 on point and concluding that r. 137 of the RFC is *ultra vires* the FC.

We certainly do not agree with the learned Attorney General on this as s. 16 of the CJA begins with "Rules of court may be made for the following purposes". And the relevant para. (a) states:

> (a) for regulating and prescribing the procedure (including the method of pleading) and the practice to be followed in the High Court, [the Court of Appeal and the Federal Court] in all causes and matters whatsoever in or with respect to which those Courts have for the first time being jurisdiction (including the procedure and practice to be followed in the registries of those

> Courts), and any matters incidental to or relating to any such procedure or practice, including (but without prejudice to the generality of the foregoing provision) the manner in which, and the time within which, any applications which are to be made to a High Court (to the Court of Appeal or to the Federal Court) shall be made.

It cannot be said that we do not have the jurisdiction, as this has been repeatedly decided in a number of authorities before this, to hear an application brought before us under r. 137 of the RFC where it is found necessary to prevent injustice or to prevent an abuse of the process of the court.

We also take note that cl. 2(c) of art. 121 of the FC provides "such other jurisdiction as may be conferred by or under Federal law". Consequently para. (b) of the definition of "Federal law" at cl. (2) of art. 160 of the FC only applies to any Act of Parliament. The learned Attorney General says this does not include the RFC but we beg to differ as the RFC is the subsidiary legislation of the relevant Act of Parliament namely the CJA. And looking at both s. 16 and s. 17 of the CJA, we hold that rules can be made for the practice and procedure where the courts have jurisdiction. The long line of cases certainly seem to support our thinking that we have the jurisdiction and the power to reopen and review any matter already decided by this court if there is any allegation of injustice or abuse of the process of the court.

Having considered the arguments and the authorities, we were of the view, which is unanimous, that we have the jurisdiction to deal with all the four motions filed as it is our finding that r. 137 of the RFC has legislative effect. Accordingly, on 7 September 2004, we had overruled the preliminary objection by the respondent and proceeded to hear all the four motions.

My learned sister Siti Norma Yaakob FCJ and my learned brother Alauddin Mohd Sheriff FCJ have seen this judgment in draft and have expressed their agreement with it. Similarly, as regards the four motions, I have had the advantage of reading their respective judgments and totally agree with the reasoning and conclusions therein.

Siti Norma Yaakob FCJ:

Four separate notices of motion have been filed by the applicant for the common purpose of seeking to review an earlier judgment of this court dated 10 July 2002 ("the impugned judgment"). The impugned judgment upheld and confirmed the convictions and sentences that had been imposed on the applicant by the High Court after he was found guilty on four charges of corruption under s. 2 of the Emergency (Essential Powers) Ordinance 1970. Appeals by the Applicant against such convictions and sentences had also been dismissed by the Court of Appeal on 29 April 2002.

The four notices of motion seek:

(1) to set aside the convictions and sentences as seen from encl. 80(a) which is dated 9 August 2002. The applicant relies on twelve grounds but before us, his Counsel, Mr. Karpal Singh confined his submissions to only four grounds namely those stated at paras. 5(3), (4), (5) and (12) of the applicant's affidavit in support of encl. 80(a).

(2) to allow fresh/additional evidence that was not available during the trial to be adduced as seen from encl. 89(a) which is dated 10 March 2003.

(3) leave to rely on five additional grounds at the hearing of encl. 80(a). This is encl. 97(a) and is dated 14 March 2003 and the five additional grounds are stated as follows.

(i) The impugned judgment infringed the provisions of the proviso to s. 94(2) of the Courts of Judicature Act 1964 ("the Act").

(ii) The three member Bench of this Court that heard the applicant's appeals ("the first corum") had not directed its mind to the fact that the Court of Appeal did not have the opportunity to consider the remarks expressed by another panel of this court ("the second corum") in the contempt proceedings against Zainur Zakaria, one of the applicant's counsel at his trial. These remarks relate to the conduct of the trial judge and the loss of opportunity by the Court of Appeal to consider those remarks deprived that court from making a ruling as to the suitability of the trial judge to continue the trial to its conclusion.

(iii) The failure of the first corum to direct its mind to the same remarks had prevented the first corum from ruling that such conduct infringed the provisions of r. 3(1)(d) of the Judges' Code of Conduct 1994.

(iv) The failure of the first corum to link the same remarks to the applicant's trial deprived it from concluding the trial judge's bias against the applicant.

(v) That the trial judge's bias was so serious that the proviso to s. 92 of the Act could not be invoked.

(4) leave to rely on another additional ground at the hearing of encl. 80(a). That additional ground is in fact an extension of the ground in para. 5(12) of encl. 80(a) and in substance it posed the question as to whether s. 94(2) including the proviso thereto of the Act is unconstitutional and void and is of no effect as it impinges on the judicial independence of individual judges of the Federal Court. This notice, encl. 124(a), is dated 2 September 2004.

As the effect of the applications in encls. 80(a) and 89(a) is to reopen, rehear and review appeals that have already been heard and disposed of on their merits, a preliminary objection was taken by the respondent that we do not have the necessary jurisdiction either in law or under common law to relitigate on such appeals. The respondent further contends that r. 137 of the Federal Court Rules, 1995 on which the two applications are grounded has no application.

My brother, Abdul Malek Ahmad PCA has already dealt with this preliminary objection and for the reasons that he has stated in his judgment, I concur that the preliminary objection is misplaced as r. 137 does provide us with the inherent powers to review our earlier decisions provided that such an exercise can only be undertaken sparingly and only in rare and exceptional circumstances to prevent injustice.

Following our ruling that r. 137 is not *ultra vires* the Act or the Federal Constitution and that we can invoke our inherent powers under that rule, no objection was taken by the respondent for the applications for leave in encls. 97(a) and 124(a) and we accordingly granted leave to the applicant to rely on the additional grounds in his applications to review.

As there was overlapping in the nature of the grounds relied upon to support the applications to review, those grounds became clearer after the submissions of both Mr. Karpal Singh and Mr. Christopher Fernando, the applicant's lead counsel, as both of them confirmed that they were raising the following issues to support their applications to review.

(1) Whether the impugned judgment has any legal effect as it was delivered pursuant to a provision of the law which impinges on the independence of individual judges.

(2) Whether the remarks on the conduct of the trial judge made in the contempt proceedings against Zainur Zakaria

   (i) had the effect of depriving the applicant of one tier of appeal.

   (ii) had the effect of supporting a ruling that the trial judge had infringed the provisions of r. 3(1)(d) of the Judges' Code of Conduct 1994.

   (iii) should have been considered by the first corum as forming a link (and not considered in isolation as was done) to establish the trial judge's bias against the applicant.

(3) Whether the first corum had correctly invoked the proviso to s. 92(1) of the Act bearing in mind that the trial was flawed as the trial judge was biased. I need to mention here that in encl. 97(a) reference is made to the proviso to s. 92 of the Act as the relevant law applicable. This cannot be right as the relevant proviso must be the proviso to s. 92(1) of the Act as firstly sub-s. (1) of the section is the only sub-section that has a proviso to it and secondly what is meant to be conveyed is that despite the bias shown by the trial judge, the first corum still maintained that such bias did not amount to there being a miscarriage of justice and relying on the proviso dismissed the applicant's appeals. This the applicant says amounts to a wrongful approach to s. 92(1) of the Act.

(4) Whether there had been a suppression of evidence when the trial judge refused to admit evidence showing the unprofessional conduct of two named prosecutors in attempting to procure fabricated evidence tending to show the Applicant's improper sexual conduct.

Since the right to review depends on the compelling circumstances of each case, I shall in this judgment attempt to consider one aspect of Mr. Karpal Singh's arguments namely all the issues relating to the applicability of s. 94(2) of the Act and the constitutionality of the proviso thereto.

Section 94 is concerned with the manner to which judgments of this court are to be pronounced and delivered and for convenience I reproduce the provisions of the whole section as follows.

> 94 Judgment
>
> (1) On the termination of the hearing of an appeal the Federal Court shall, either at once or on some future day which shall either then be appointed for the purpose of which notice shall subsequently be given to the parties, deliver judgment in open court.
>
> (2) In criminal appeals and matters the Federal Court shall ordinarily give only one judgment, which may be pronounced by the Chief Justice or by such other member of the Federal Court as the Chief Justice may direct:
>
> Provided that separate judgments shall be delivered if the Chief Justice so determines.
>
> (3) The judgment of any member of the Federal Court who is absent may be read by any other Judge.

Our focus however is on sub-s. (2) and its proviso, the origin of which can be traced to similar provisions appearing in s. 31(2) of the Courts Ordinance 1948 which has since been repealed and s. 62(2) of the superseded Courts of Judicature Act No. 7 of 1964.

In interpreting sub-s. (2) of s. 94, Mr. Karpal Singh drew our attention to the format in which judgments in criminal appeals of this Court are to be prepared and delivered. He took exception to the fact that the impugned judgment is embodied in two separate written judgments delivered by two members of the first corum whilst the third member did not write any judgment at all. On its own, each of the two separate judgments dealt with separate subject matters, one on conviction and the other on sentence, and according to Mr. Karpal Singh neither of the judgment is complete. He contends that each judgment should have dealt with conviction and sentence jointly rather than have the subject matters of the appeals split up as was done in the applicant's appeals. This is particularly so as the notices of appeal relate to both convictions and sentences.

Since there are two separate judgments, then by implication the Chief Justice must have so directed, exercising his powers to do so under the proviso to s. 94(2). Mr. Karpal Singh then questioned the constitutionality of this proviso as it impinges on the judicial independence of individual judges.

From the precise and unambiguous language of s. 94(2), we agree that the usual and accepted practice is that there will be one judgment be it written or oral, delivered at the conclusion of the hearing of a criminal appeal or matter and this can only happen where all members of the corum have reached consensus and are unanimous in their decisions. The unanimous decision will then be delivered by the Chief Justice as a judgment of the court and again this can only happen when he presides as a member of the corum. If he does not so preside, then he directs a member of the corum to do so and by tradition that burden falls on the most senior member of the corum to deliver the unanimous judgment. This arrangement if I am permitted to state so is in compliance with s. 74(2) of the Act which provides that in "the absence of the Chief Justice, the most senior member of the court shall preside."

As an extension of the arguments of the learned Attorney General, who appeared for the respondent, it is my considered opinion that s. 94(2) does not prevent or debar separate written judgments being given by the other members of the corum even though the consensus reached had been a unanimous one. This is so as the reasons relied on to arrive at the unanimous conclusion need not necessarily be the same for each member of the corum and it is only through the separate judgments that the differing reasonings can be expressed.

So far I have only alluded to the practice of pronouncing a unanimous judgment under the provisions of s. 94(2). What happens when there is dissent when no unanimous majority can be reached in the outcome of an appeal. That situation manifests itself particularly in appeals where complexities of the law need to be determined thereby invoking differing views and conclusions. Under these circumstances reliance will be had to the proviso to s. 94(2) as separate judgments need to be prepared and delivered and the Chief Justice determines who should write the separate judgments. Here there is in Mr. Karpal Singh's contention interference on the part of the senior most judge in the country to influence the outcome of the appeal, thereby impinging on the judicial independence of individual judges. He further contends that in so determining, the Chief Justice had run foul of the oath of office taken by judges upon appointment pursuant to art. 124(2) of the Federal Constitution.

The element of interference should not arise where the Chief Justice presides over a criminal appeal where unanimity could not be reached. By virtue of his office and seniority he presides over all criminal appeals that are fixed before him and as such there is nothing objectionable to him directing who should prepare and deliver the separate judgments over the criminal appeals he presides. However can the same consideration apply when he directs who should prepare the separate judgments in a criminal appeal where he does not preside? The applicant maintains that he has no business to direct who should prepare the separate judgments as such direction amounts to interfering with the independence of individual judges. In this context when one speaks on the independence of the individual judge it must mean independence to decide a case without fear or favour, without reference from any quarter including any interference from the Head of the Judiciary.

Perhaps the situation can be logically analysed by looking at the role of the Chief Justice when he decides to act under the proviso. He is not, as Mr. Karpal Singh wants us to believe, dictating how a judge should decide a case, he is not asking the judge to decide favourably for a given person or authority. He is exercising a function which the law allows him to do ie, to direct who should prepare and deliver separate judgments; no more no less. I regard such function as the performance of a non judicial duty affecting the administration of justice. It may well be that the complexity of the case warrants the production of more than one judgment and when he determines that should be the case, this determination in my considered opinion should not be regarded as being the basis of an interference which go to the very root of a judge's function as one who is fair and independent.

Finally I come to the two separate judgments delivered in the applicant's appeals and the first question that brings to mind is whether they are concurrent judgments expressing the unanimous decision of the first corum.

To answer this question, the two judgments have to be read in their entirety and the concurrence and unanimity of the decisions made are to be gauged from the language used.

The judgment of Haidar Mohd Noor FCJ, the most junior member of the first corum runs into 59 pages and dealt with the main issue on conviction. It is headed JUDGMENT OF THE COURT, and throughout the judgment, there is a strong preference in the use of the subjective plural "we" as opposed to the subjective singular "I" together with the corresponding possessive pronoun "our" as opposed to "my". Thus phrases like "we need not consider, we do not propose, we would in answer say, it is not, in our respectful view, we agree", are some of such phrases used throughout the judgment and coupled with the heading of the judgment, it is my considered opinion that it is a concurrent judgment concluded after all the three members had discussed the issues raised and unanimously concluded that the convictions stand. The fact that the concurrence of the other two members is not expressed in the judgment makes no difference to my finding as such concurrence has been more than adequately revealed in the language of the judgment.

Mohd Dzaiddin Abdullah, the then Chief Justice who presided in the appeals delivered the second judgment on sentence and although he had headed his judgment in his name his concluding remarks bear all the resemblance of a concurrent judgment. This is how he ended the judgment.

> We are in full agreement with the statement of principle enunciated above.
>
> After considering the reasons given by the learned judge, we are satisfied that the imposition of the sentence of 6 years' imprisonment to commence from the date of conviction has not occasioned an error or principle of law. Therefore, we see no reason to interfere with the exercise of discretion vested in him.
>
> Accordingly, we dismiss the appeal against sentence.

Since both judgments have adequately and unanimously decided on the main issues of conviction and sentence, and read together they represent the judgment of the court, the absence of a written judgment from the Chief Judge of Sabah and Sarawak, the third member in the first corum cannot affect the legality of the judgment and neither can it be taken to mean that he has dissented. The fact that he had not produced a written judgment points to the conclusion that

since he was in complete agreement to the views of the two members, no purpose would be achieved by a third judgment as he would be merely repeating what has already been adequately expressed in the judgments of Haidar Mohd Noor FCJ and Mohd Dzaiddin Abdullah CJM.

My brothers, Abdul Malek Ahmad PCA and Alauddin Mohd. Sheriff FCJ who have had sight of this judgment agree that for the reasons stated in this judgment, it is our considered opinion that s. 94(2) and its proviso do not have the effect of curtailing the judicial independence of any individual judge when the Chief Justice determines who should prepare and deliver separate judgments in a criminal appeal or matter. To that extent, the applicant cannot rely on his objection to s. 94(2) and its proviso to support his claim to have his appeals reviewed before another panel of this court. My learned brother, Alauddin Mohd. Sheriff FCJ will now consider the remaining grounds in the applications to review.

Alauddin Mohd Sheriff FCJ:

By encl. 89(a) the applicant prays for an order that this Honourable Court invoke its inherent powers under r. 137 of the Rules of the Federal Court 1995, to allow fresh/additional evidence affecting the trial to be adduced as such evidence was not available during the trial. This application is supported by the affidavit of the applicant himself sworn on 10 March 2003 which is in encl. 89(b).

Briefly, the applicant's affidavit reveals the following facts:

The applicant was charged under s. 2 of the Emergency (Essential Powers) Ordinance No. 22 of 1970 at the High Court of Malaya at Wilayah Persekutuan on 14 April 1999 on four charges of corruption. The applicant was found guilty of the said charges, convicted and sentenced to six years imprisonment on each charge, with the sentences being ordered to run concurrently.

The applicant appealed against the decision of the High Court to the Court of Appeal which dismissed the appeal on 29 April 2002. He then appealed to the Federal Court against the decision of the Court of Appeal. On 10 July 2002 his appeal to the Federal Court was dismissed with the convictions and the sentences being confirmed.

It has been brought to the applicant's knowledge that one of his counsel, Encik Zainur Zakaria (ZZ), had faxed copies of two letters he received from Mr. Manjeet Singh Dhillon (MSD) to Mr. Christopher Fernando, his lead counsel, just before the hearing of his appeal in the Court of Appeal. The letter sent to ZZ contained an enclosure which is a letter written by MSD to YAA the Chief

Justice where MSD made a formal complaint against Justice Augustine Paul, the trial judge, for improper conduct in the *Re ZZ* case which occurred during the applicant's trial.

In the light of this new evidence contained in MSD's letter the applicant instructed his counsel to file this application to urge this court to allow him to adduce such evidence in the interest of justice under r. 137 of the Rules of the Federal Court 1995.

As stated in para. 17 of the applicant's affidavit the evidence that is sought to be adduced is to the following effect:

(i) That MSD was requested by Tan Sri Mohtar (TSM) to see him before the proposed contempt proceedings against himself and ZZ began that morning. The request was made through MSD's counsel, Mr. Jagjeet Singh (JS). MSD reluctantly agreed and met with TSM. They met at the ante room at the courthouse in the presence of Datuk Abdul Gani Patail (AGP), Datuk Azhar Mohamad (AM) and JS. Upon seeing MSD, TSM went up and hugged him and turned around and told AGP and AM that MSD was an altruist and apologized to MSD for not having done anything on MSD's letter in which he had levelled accusations against AGP. TSM added that he had not as yet taken this matter up with his officers. MSD responded by reminding TSM that he had made very serious allegations against his officers and had written to him expecting something to be done but that nothing had been done. This letter referred to is the letter where MSD complained to TSM that AGP and AM had attempted to extort fabricated evidence from his client Datuk Nallakaruppan (DN) through him to be used against Datuk Seri Anwar Ibrahim (DSAI) in exchange for DN's life. TSM did not deny or refute MSD's allegations against his officers and both AGP and AM remained silent.

(ii) That as early as September 1998 DN had made a signed statement denying any involvement in any sexual improprieties involving the applicant. This statement was in response to the affidavits of SAC Musa Hassan dated 2nd September 1998 making allegations against the applicant and DN and the affidavit of TSM making vague hearsay allegations. This evidence is clearly pertinent and relevant to the applicant's case. In summarily dismissing the applicant's application to stop AGP and AM from further conducting the prosecution against him the learned judge had this to say, (the relevant portion of which reads), "Secondly the conclusion of MSD as contained in para 4 of the letter may be justifiable only if he arrived at after he had discussed the matter with his client in order to ascertain what his client knew. The letter is dated 12 October 1998. However, para 8 of the statutory declaration stated that MSD met his client on 13 October

1998 to convey AGP's demands to him. This shows that MSD came to his conclusion even before he discussed the matter with his client to find out what the latter knew. I found support of this in para 8 of the statutory declaration where MSD had said that there was nothing his client could have done … short of lying. This clearly shows that up to 13 October 1998, MSD did not know what his client knew …

If we may be permitted to say, the gist of the new evidence sought to be adduced is as follows:

(i) It is MSD's revelation that he had a meeting with the former A.G. (TSM) in the ante room of the Federal Court in which TSM called him an altruist but did not take any further action in respect of his complaint against AGP and AM.

(ii) MSD says that Justice Augustine Paul, the trial judge, was wrong in concluding that he did not know whether his client knew about DSAI's involvement with women when he wrote the letter to TSM complaining about AGP and AM.

In his lengthy submission in support of this application before us learned counsel for the applicant, Mr. Christopher Fernando, began by saying that in this case there has been gross injustice perpetrated against the applicant. Fundamental principles of law have been violated and abused. There has also been an abuse of the process of the court. It is most unprecedented in that the trial was allowed to be prosecuted by two unfair prosecutors in the persons of AGP and AM. Their conduct and participation had contaminated the entire proceedings. It was therefore urged upon us to use the inherent powers of this court to intervene and prevent injustice.

It was submitted by learned counsel that the fresh/additional evidence sought to be adduced in this case through MSD was not available to the Applicant during his trial. This evidence is relevant to the applicant's case. Further such evidence is credible and believable coming from a witness who is a senior and respected advocate and solicitor and a former Chairman of the Bar Council. In addition this evidence would have had a decidedly important influence on the outcome of the applicant's case.

It was further submitted by learned counsel that in this case the applicant have met all the conditions to justify the reception of the evidence proposed to be adduced.

In considering whether to allow fresh evidence to be adduced on appeal the English Court of Criminal Appeal in *R v. Parks* [1961] 3 All ER 633 referred to certain principles. They are:

(i) the evidence sought to be called must be evidence which was not available at the trial;

(ii) the evidence must be relevant to the issues;

(iii) it must be credible evidence in the sense of being well capable of belief; and

(iv) the court will, after considering that evidence, go on to consider whether there might have been a reasonable doubt in the minds of the jury as to the guilt of the appellant if that evidence had been given together with the other evidence at the trial.

In *The Constitution of India AIR Commentaries* Vol III 2nd (1971) Edition the writer, under the heading of "Grounds of review" had this to say (at p. 228).

> Where a litigant has obtained a judgment in a Court of Justice, he is, by law entitled not to be deprived of that judgment without solid grounds. Where, therefore, a review of a judgment is asked for by a party, the greatest care ought to be exercised by the court in granting the review especially where the ground of review is the discovery of fresh evidence. It is so easy to the party who has lost his case to see what the weak part of his case was, and the temptation to lay and procure evidence which will strengthen that weak part and put a different complexion upon that part of the case must be very strong (1). The rule that permits a new trial to be granted on account of the discovery of new evidence has, therefore, been fenced round with many limitations. Thus, the party asking for a new trial must show that there was no remissness on his part in adducing all possible evidence at the trial (2). Further, the new evidence must be such as is presumably to be believed and such that if adduced, it would practically be conclusive, ie, evidence of such a class as to render it probable almost beyond doubt that the judgment would be different (3). Where it is very doubtful whether the evidence, if produced, would have had any effect on the judgment, there is no ground for review (4).

In considering the exceptional conditions when an appellate court would be willing to admit additional evidence our Federal Court in *Mohamad bin Jamal v. Public Prosecutor* [1964] 30 MLJ 254 applied the same principles mentioned in *R v. Parks* (see also *Lau Foo Sun v. Government of Malaysia* [1970] 2 MLJ 70 and *Asiatic Development Bhd. & Anor v. Balachandran a/l Palanysamy* [1996] 1 CLJ 725).

Reverting to the application before us the facts revealed that the new evidence mentioned in para. 17 of the applicant's affidavit is not evidence that was not available at the trial. As a matter of fact the applicant was fully aware of the existence of such evidence. The charges faced by the applicant was one of abuse of power under s. 2(1) of Ordinance 22 of 1970. The said new evidence was available during the trial itself. More importantly the learned trial judge had rejected this evidence as being irrelevant. The Court of Appeal and the Federal Court upheld his finding. As they have no relevance to the charges faced by the applicant, we cannot see how they can materially affect the result of the case.

Under the circumstances we find that the two issues raised in para. 17 of the applicant's affidavit do not meet the conditions or principles mentioned in *R v. Parks* or *Mohamad Jamal v. Public Prosecutor*. That being so they do not qualify as new or additional evidence.

In *Lo Fat Thjan & Ors. v. Public Prosecutor* [1968] 1 MLJ 274 the Federal Court again had occasion to consider the issue of additional evidence. It was held *per curiam*:

> We would deprecate generally the admission of additional evidence on appeal except in clearly exceptional circumstances. The adversary system in our trials is hardly compatible with allowing lacunae in the case of any party to be filled in by afterthoughts or countenancing reconstruction of any case after it has failed at the trial.

It is obvious to us from the above decision that even during an appeal the courts are very strict when admitting additional evidence more so in a situation like ours where the appeal process have already been fully exhausted. The above decision also speaks of exceptional circumstances which we find are totally absent in the present application. The issues raised by the applicant are all issues that could have been obtained during the trial and will not materially affect the result of the trial had it been brought up for consideration.

We take the view that by introducing such evidence, the applicant is seeking to reopen, reexamine and review the decision which has been conclusively decided by the final court of justice. The issues raised by the applicant cannot be viewed as a ground to invoke r. 137. In essence, it is an attempt to persuade this court to accept the purported new evidence with a view to relitigate the appeal. As we have said earlier they are not evidence relevant to the charge and they do not qualify to be new evidence before the court. We feel that the purported new evidence ought to have been contemplated by the applicant's able defence team during the trial itself. The purported new evidence was available to the applicant's defence team even while the trial was going on.

The allegation of misapprehension of facts against the trial judge is not new evidence but is an issue that goes to the merits of the case and should have been canvassed throughout the appeal process. Even if the purported misapprehension was a ground of appeal, it does not lend any weight against the charges as they were one of corruption and not relating to misconduct with women.

Finally, we would say that there is no fraud or suppression of evidence and neither is there new evidence before the court which merits the court to entertain a reopening or rehearing of the case.

We shall now proceed to consider encl. 97(a).

By way of encl. 97(a) the applicant applies for an order that he be given leave to rely on additional grounds at the hearing of his Notis Usul (encl. 80(a)) for an order that this Honourable Court invoke its inherent powers under r. 137 of the Rules of the Federal Court 1995 and set aside the convictions and sentences of the applicant that were confirmed and upheld by the Federal Court on 10 July 2002.

The additional grounds appear in the affidavit in support of this application. They are as follows:

1. The Federal Court's decision handed down on 10th July 2002 is in infringement of the provisions of section 94(2) of the Courts of Judicature Act, 1964 [Act 91] (Revised 1972);

2. The Federal Court was wrong in not directing its mind to the fact that the Mahkamah Rayuan did not have the opportunity of considering the remarks directed by the Federal Court in *Zainur Zakaria v. Public Prosecutor* [2001] 3 MLJ 604 against the learned trial judge Augustine Paul J and their effect on the trial subsequently thereby depriving the appellant an opportunity for that court to rule on the vital consideration as to the learned trial judges' suitability to have continued with the trial to its conclusion;

3. The Federal Court was wrong in not directing its mind to the fact that the remarks passed by the Federal Court in *Zainur Zakaria*'s appeal amounted in substance to ruling that the learned trial judge had infringed the provision of rule 3(1)(d) of the Judges' Code of conduct 1994 which states:

> A Judge shall not conduct himself dishonestly or in such manner as to bring the Judiciary into disrepute or to bring discredit thereto' and had thereby disqualified himself from conduct of the appellant's trial;

4. The Federal Court was wrong in considering the remarks passed against the learned trial judge in *Zainur Zakaria*'s appeal in isolation when the proceedings to commit Zainur Zakaria for contempt of court were irretrievably linked to the appellant's trial which became hopelessly contaminated by the role played by the learned trial judge in those proceedings, particularly when considered in the light of the learned trial judge's belligerent stance, convicting and sentencing Zainur Zakaria to three month's imprisonment, an attempt to cite the entire defence team for contempt of court and general bias against the defence; and

5. The Federal Court was wrong in not considering the appellant's trial was so fatally flawed by the bias shown by the learned trial judge which was so serious that the proviso to section 92 of the Courts of Judicature Act 1964 could not under the circumstances be invoked.

I will not consider the first ground as the matter had been dealt with by my learned sister earlier.

In considering the remaining additional grounds mentioned above it is appropriate that we refer to the relevant part of the judgment of the Federal Court reported in [2002] 3 CLJ 457 concerning the matter.

At p. 487 this is what the court said:

> We are of the view that the facts and circumstances of Zainur Zakaria cannot be equated to the facts of this case. There it was more towards the conduct of Zainur Zakaria that the learned judge was more concerned with. From what we can gather from the record, it was the learned judge's belief that Zainur Zakaria's action was to delay the proceedings and to sensationalize the trial by alleging on the conduct of the two prosecutors to fabricate evidence against the appellant. The conduct of the learned judge in Zainur Zakaria is not really relevant to the amended charges faced by the appellant. In addition thereto, there was the allegation of lack of time given for Zainur Zakaria to prepare his defence. The learned judge might well appear to lean towards the prosecution as indicated by the Federal Court but he cannot be said to be showing the same inclination on the evidence in the trial against the appellant. A good illustration is where as we stated earlier, he considered the appellant's case at length.

Further at p. 487 the court continued:

> Mr. Christopher Fernando submitted that there were threats of contempt against counsel including himself by the learned judge.We have examined Mr. Christopher Fernando's complaint but regret to say that the learned judge, being human himself, and as stated earlier, because of the wide publicity given to this case, he had to exercise a lot of restraints in controlling the proceedings and in doing so he may have uttered harsh words or even threaten counsel with contempt and all these must be taken in that spirit. It is not so much

> of the learned judge leaning towards the prosecution or being prejudiced towards the defence. He has the statutory duty to see that irrelevant and inadmissible evidence is not allowed to creep in or for that matter stop counsel from challenging his rulings as otherwise the proceedings will go haywire.

Reading the excerpts from the judgment quoted above we are of the view that the court had embarked upon a full and proper consideration of the effect of the decision in Zainur Zakaria in the appeal before it. The court had categorically stated that the facts and circumstances of Zainur Zakaria cannot be equated with the facts of the applicant's case. The court also retorted by saying that the conduct of the learned judge in Zainur Zakaria is not really relevant to the amended charges faced by the applicant. We would add by saying that the contempt proceedings is a separate proceedings altogether. It was only against Zainur Zakaria and not the whole of the defence team. There is no nexus between the allegation of fabrication and the corruption appeal. The allegation was on fabrication of evidence in trying to get Datuk Nallakaruppan to cooperate by giving evidence on the applicant's sexual misconduct with women. Whereas the charges in the corruption trial are that he abused his position in getting the police to obtain retraction letters from two individuals. Sexual misconduct is not an ingredient of the charges. None of the prosecution witnesses in the corruption trial made any reference to Datuk Nallakaruppan's role whatsoever.

The Federal Court also referred to the complaint raised by the applicant's counsel that their submission on the conduct of the learned judge in the Court of Appeal was brushed aside by them. The court had examined the judgment of the Court of Appeal and agreed that there was an omission on their part to consider this issue. Nonetheless the court itself had considered this point and came to the conclusion that it had not occasioned any miscarriage of justice (see p. 489).

The Federal Court in its judgment also considered the paramount question raised by the applicant whether the conduct of the trial judge which the applicant said was grossly unfair towards him has occasioned any miscarriage of justice which entitled him to an acquittal.

This is what the court said (at pp. 489, 490, 491):

> On this issue, we are guided by s. 92(1) of the Courts of Judicature Act 1964 in particular the proviso to s. 92(1) which reads:
>
> '…:

> Provided that the Federal Court may, notwithstanding that it is of opinion that the point raised in the appeal might be decided in favour of the appellants, dismiss the appeal if it considers that no substantial miscarriage of justice has occurred.'

In addition to the above, we have s. 167 of the Evidence Act 1950 that works in tandem with the proviso to s. 92(1) of the Courts of Judicature Act 1964. It reads:

> The improper admission or rejection of evidence shall not be ground of itself for a new trial or reversal of any decision in any case if it appears to the court before which the objection is raised that, independently of the evidence objected to and admitted, there was sufficient evidence to justify the decision, or that, if the rejected evidence had been received, it ought not to have varied the decision.

The two provisions set out above had recently been considered by the Court of Appeal in the famous case of *Juraimi bin Husin v. PP* and *Mohd Affandi bin Abdul Rahman & Anor v. PP* [1998] 2 CLJ 383.

...

The Court of Appeal thereafter concluded at p. 587 thus:

> To summarize the authorities cited, if in a criminal appeal an appellant has demonstrated errors in point of evidence or procedure, it is the duty of this court to determine whether, despite the error or errors in question, there exists a reasonable doubt in its mind as to the guilt of the accused, based upon the admissible evidence on the record. If the error or errors complained do not have this effect, then it is our duty to plainly say so and maintain the conviction.

The judgment of the Court of Appeal was affirmed by the Federal Court though no written grounds were made.

Having said the above the court finally concluded by saying:

> We have examined the record of the proceedings and the grounds of judgment of the learned judge as closely as we can and the grounds of judgment of the Court of Appeal in subsequently affirming the conviction of the appellant by the learned judge. We are satisfied that the errors complained of have not occasioned a substantial miscarriage of justice and we have to plainly say so and to uphold the conviction.

In view of what we have said above we cannot see how it can be said that the judgment of the Federal Court suffered the infirmities as alleged in the additional grounds relied by the applicant. We also fail to see how the Federal Court's decision can be said to have irregularities under the Courts of Judicature Act 1964 as alleged.

We would reiterate that the findings and observations in the Federal Court pertaining to Zainur Zakaria's contempt proceedings have no bearing at all on the corruption appeal. By introducing new grounds, it is an attempt on the part of the applicant to try to relitigate the issues which have been conclusively settled.

On the issue of relitigation it is useful to rely on the *dicta* of Eusoffe Abdoolcader FJ (as he then was) in *Dato' Mokhtar Hashim & Anor v. PP* [1983] 2 MLJ 232 where the learned judge said:

> ... This attempt to relitigate and reopen an issue conclusively decided in respect of the same proceedings and between the same parties would appear to us to be as clear an instance of an abuse of the process of the court as one can find within the connotation thereof enunciated in the speech of Lord Diplock in *Hunter v. Chief Constable of the West Midlands Police & Ors* [1982] AC 528, 542 which was applied by this court in *Tractors Malaysia Bhd. v. Charles Au Yong* [1982] 1 MLJ 320, 321.

Rule 137 of the Rules of the Federal Court 1995 allows the Federal Court to exercise its inherent powers to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court. The rule has been invoked by the Federal Court in a number of cases like *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61 and *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577. However, it must be observed that its application was only in limited circumstances. If there were to be a liberal application of r. 137 then there would be chaos to our system of judicial hierarchy. Hence, we would think that it is on a case by case basis. Certainly it cannot be the intention of the legislature when promulgating r. 137 that every decision of this court is subject to review. To do so would be against the fundamental principle that the outcome of litigation should be final.

My learned brother Abdul Malek Ahmad PCA and my learned sister Siti Norma Yaakob FCJ have seen this judgment in draft and have expressed their agreement with it. Similarly I have had the advantage of reading their respective judgments and totally agree with the reasoning and conclusions, therein.

Finally, having given our utmost consideration to all the four applications before us we find that there are no merits to invoke the exercise of our inherent powers under r. 137.

In the result, all the four applications ie, encls. 80(a), 89(a), 97(a) and 124(a) are hereby dismissed.